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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM 1991

WHOLESALE AND RETAIL FOOD DISTRIBUTION LOCAL 63, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner,

VS.

JAMES BENDER, HARRY RODRIGUEZ, CLYDE WALLACE, DAN DOUGLASS, JACK DOUGLASS, HAROLD LARSEN, HETTI COLE, E. ELOISE HARRIS and JAMES BROWN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether punitive damages may be awarded in litigation brought by a union member against a union pursuant to Section 102 of the Labor-Management Reporting and Disclosure Act?

2. Whether a punitive damage award rendered in such litigation which far exceeds the union's net worth is clearly excessive and unconstitutionally deprives the union of its property without due process of law?

3. Whether a union member who only obtains a damage award in such litigation is entitled to recover his reasonable attorneys' fees consistent with the "common benefit" exception to the American Rule regarding attorneys' fees?

4. Whether a prevailing plaintiff may recover its reasonable attorneys' fees consistent with the "bad faith" exception to the American Rule regarding attorneys' fees based upon bad faith prelitigation misconduct and, if so, under what circumstances?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner Wholesale and Retail Food Distribution Local 63, International Brotherhood of Teamsters ("Local 63") and respondents James Bender, Harry Rodriguez, Clyde Wallace, Dan Douglass, Jack Douglass, Harold Larsen, Hetti Cole, E. Eloise Harris and James Brown (collectively "plaintiffs").

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Local 63 respectfully requests that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit ("ninth circuit") rendered in this case on December 23, 1991.

OPINIONS BELOW

Plaintiffs commenced litigation against Local 63 seeking damages for the violation of rights guaranteed by Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959, as amended ("LMRDA") [29 U.S.C. § 411(a)(1)]; battery; intentional infliction of emotional distress; and negligence complaining they were assaulted and battered on their way to a Local 63 meeting where nominations for union office were to take place.

Besides Local 63, Robert Marciel ("Marciel"), Local 63's principal officer; Al Friedman ("Friedman"), a Local 63 union member; and Joint Council of Teamsters No. 42 ("Joint Council"), an appellant labor organization with which Local 63 is affiliated, were defendants.

Following a five (5) week jury trial and five (5) days of jury deliberations, the jury rendered a verdict in favor of Marciel and Friedman on all claims; in favor of Local 63 and Joint Council[1] on the battery claim; and in favor of plaintiffs against Local 63 on the federal LMRDA, intentional infliction of emotional distress and negligence claims.

In its general verdict, the jury assessed compensatory damages against Local 63 in favor of the nine (9) plaintiffs in the aggregate amount of $68,687.57 and punitive damages in the amount of $500,000.00.

Thereafter, Local 63 timely filed a motion for judgment notwithstanding verdict; or, in the alternative, motion for new trial ("post-trial motion") and plaintiffs, pursuant to Section 102 of the LMRDA, filed a motion seeking an award of their reasonable attorneys' fees.

The lower court denied Local 63's post-trial motion and awarded plaintiffs $200,000 in attorneys' fees. [App. A, pp. 1-34.][2]

Local 63 timely appealed the jury's verdict and the lower court's denial of its post-trial motion to the ninth circuit.

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[1]The jury deadlocked as to the Joint Council on the first and third claims and a mistrial was thereafter declared as to it on those claims.

[2]References in this Petition to "App." refer to the Appendices attached hereto.

On December 23, 1991, the ninth circuit affirmed the lower court in its entirety. [App. B, pp. 1-9.]

On January 14, 1992, plaintiffs applied to the ninth circuit for an award of the attorneys' fees they incurred on appeal in the amount of $30,726.75. To date, the ninth circuit has not ruled upon the application.

JURISDICTION

The decision of the ninth circuit was filed on December 23, 1991. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1) for review by a Writ of Certiorari.

STATUTES INVOLVED

This case directly involves the due process clause of the Fourteenth Amendment and Title I of the LMRDA generally and Section 102 of the LMRDA specifically which provides in pertinent part:

> "Any person whose rights are secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in the district court of the United States for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412.

STATEMENT OF THE CASE

On November 2, 1985, plaintiffs were assaulted and battered in the vicinity of Local 63's hiring hall on their way to a union meeting at which nominations for local union officers were to be conducted by unidentified assailants who were wearing tee-shirts supporting the reelection candidacy of Marciel.

Not surprisingly, none of the plaintiffs attended and participated in the nominations meeting. The following day, they filed a written protest requesting another nominations meeting be held.

Thereafter, with Local 63's consent, a second nominations meeting was conducted on January 4, 1986 at a different location and time of day. Although adequate safeguards were taken to ensure plaintiffs' safety and they were apprised of such beforehand, none of the plaintiffs attended the second nominations meeting.

A few months later, plaintiffs commenced this litigation which ultimately proceeded to a trial by jury.

Over Local 63's objections, the lower court submitted a general verdict form to the jury and only one (1) instruction on the issue of punitive damages. [App. C, pp. 1-2.]

After five (5) days of deliberation, the jury awarded the nine (9) plaintiffs collectively $68,687.57 in compensatory damages and $500,000 in punitive damages which was upheld by the lower court when it denied Local 63's post-trial motion and affirmed by the ninth circuit.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD ADDRESS AND RESOLVE AN ISSUE IT SPECIFICALLY LEFT OPEN IN *INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS V. FOUST*: WHETHER PUNITIVE DAMAGES MAY BE AWARDED TO A UNION MEMBER WHO SUCCESSFULLY SUES A UNION FOR VIOLATING TITLE I OF THE LMRDA

In *International Brotherhood of Electrical Workers v. Foust*, 444 U.S. 42 (1979), this court declared union

members are not entitled to recover punitive damages when they prevail against a union for breaching the duty of fair representation. This court's reluctance to assess unions with punitive damage awards is not limited to duty of fair representation actions. *See e.g., Teamsters v. Morton*, 377 U.S. 252 (1964) (punitive damages may not be recovered by a prevailing employer who successfully sues for damages resulting from an unlawful secondary boycott consistent with Section 303 of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 187(b)].

Although the majority opinion in *Foust* "express[ed] no view on the propriety of punitive damages in suits under the Landrum-Griffith Act," 444 U.S. at 48 n. 9, at least one (1) circuit has interpreted the majority opinion to mean the rationale for a *per se* rule prohibiting the award of punitive damages to a successful union member in a breach of the duty of fair representation action applies equally to cases such as this one when a union member successfully sues a union for violating Title I of the LMRDA. *See Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980).

This court in *Foust* declared punitive damages in unfair representation actions were *per se* inconsistent with "federal labor policy" because a damage award should only "make the injured employee whole;" "federal labor policy is 'essentially remedial' and hence inhospitable to punitive awards;" "punitive damages awards 'could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents;' " and "the prospect of punitive damages in such cases could curtail the broad and far-reaching discretion afforded unions in handling its affairs." *Id.* at 2126-31.

All of these factors and concerns are present when a union member successfully sues a union for violating Title I of the LMRDA.

Congress intended Section 102 of the LMRDA to be broad enough to encompass any loss suffered by a union member and make him financially whole. Its purpose was to award a prevailing union member monetary damages to compensate him for any loss suffered through the denial of any of the enunciated rights and to indemnify him when compelled to resort to litigation when such rights have been infringed upon by a union.[3]

If a prevailing union member was awarded punitive damages in addition to his attorneys' fees, it might well deplete the union funds to such an extent as "might impair the union's ability to operate as an effective collective bargaining agent," a legitimate concern recognized by this court in *Hall v. Cole,* 412 U.S. 1, 15 n. 23 (1973).

Whether punitive damages may be awarded to a successful union member in litigation brought pursuant to Title I of the LMRDA has resulted in conflicting decisions.

Although a vast majority of courts have declared punitive damages may be awarded in appropriate circumstances, they have done so with little or no discussion or

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[3]"These rights [in Title I] are enforced effectively and fairly by civil actions in the Federal courts. *In such suit the court can award money damages to compensate any loss suffered by a member* through denial of any of the enumerated rights and can enjoin any repetition of actions which deprive the members of his rights." [Emphasis added.] Remarks of representative O'Hara of Michigan. *See* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* at p. 1632 (1959).

analysis both before and since this court's decision in Foust. *See e.g., International Brotherhood of Boilermakers v. Braswell,* 388 F.2d 193, 200 (5th Cir.) *cert. den.*, 391 U.S. 935 (1968) ($12,500 in compensatory and punitive damages awarded pursuant to general verdict where battery was found); *Morrissey v. National Maritime Union of America,* 544 F.2d 19, 23 (2d Cir. 1976) ($500 in compensatory and $50,000 in punitive damages awarded against individual defendants in case where court used a special verdict form and submitted questions on liability, compensatory and punitive damages separately to the jury on the LMRDA claim); *Vandeventer v. Local Union No. 513, International Union of Operating Engineers,* 579 F.2d 1373, 1380 (8th Cir.), *cert. den.,* 439 U.S. 984 (1978) ($25,000 in compensatory and $10,000 in punitive damages awarded); *Rosario v. Amalgamated Ladies Garment, Inc.,* 605 F.2d 1228 (6th Cir. 1979) ($1,000 in compensatory and $10,000 in punitive damages awarded; court used special interrogatories); *Cooke v. Orange Belt Dist. Council of Painters,* 529 F.2d 815, 820 (9th Cir. 1979) (compensatory and punitive damages awarded in unspecified amounts); *Bise v. International Bro. of Electrical Wkrs.,* 618 F.2d 1299, 1306 (9th Cir. 1979) ($4,851 and $20,000 in punitive damages awarded); *Shimman, supra,* 625 F.2d at 80 (6th Cir. 1980) ($107,067.99 in compensatory and $100,000 in punitive damages awarded. The sixth circuit declared $100,000 punitive damage award was not excessive since the union's assets were over 2.5 million and reduced the punitive damage award assessed against the individual union officers from $75,000 to $20,000 because their net worth was $28,000 and $23,675); *Parker v. Local Union No. 1466, United Steelworkers,* 642 F.2d 104, 105 n. 1 (5th Cir. 1981) ($1,000 in compensatory and $25,000 in punitive damages awarded where battery was found);

Quinn v. DiGiulian, 739 F.2d 637, 641 n. 11 (D.C. Cir. 1984) ($7,000 in compensatory and $3,000 in punitive damages awarded); *Murphy v. Intern. Union of Operating Engineers,* 774 F.2d 114, 119 (6th Cir. 1985), *cert. den.,* 475 U.S. 101 (1986) (where battery was found, plaintiff awarded lost wages and benefits in an undetermined amount, $10,000 in general damages for pain and suffering and no punitive damages because the union in a post-judgment memorandum submitted a plan to make its decision-making and referral processes more democratic after the verdict); *Petramale v. Local No. 17 of Laborers' Intern.,* 847 F.2d 1009, 1013-14 (2d Cir. 1988) (second circuit reduced $200,000 compensatory damage and $50,000 punitive damage award to $100,000 and $10,000 respectively); *Guidry v. Intern. U. of Operating Eng., Local 406,* 882 F.2d 929, 942-43 (5th Cir. 1989), *vacated on other grounds,* ____ U.S. ____ 110 S.Ct. 1465 (1990) ($5,310.50 in lost wages, $20,000 in damages for emotional distress and $10,000 in punitive damages awarded; the fifth circuit vacated and remanded back to the lower court the punitive damage award); *Doty v. Sewall,* 908 F.2d 1053, 1062 (1st Cir. 1990) ($250,000 in compensatory and $300,000 in punitive damages awarded where battery was found); and *Sands v. Abelli,* 290 F.Supp. 677, 684-85 (S.D. N.Y. 1968) ($3,500 in compensatory and $6,000 in punitive damages awarded where battery found). *Contra, McCraw v. United Association of Journeymen and App. Plumbing* 341 F.2d 705, 706-07 (6th Cir. 1965); *Burris v. Int'l. Brotherhood of Teamsters,* 224 F.Supp. 277, 279-80 (W.D. N.C. 1963) ("Nothing within the Act or in the legislative history of the Act indicates or specifies if punitive damages are "appropriate relief."); and *Magelssen v. Local Union No. 518, Operative Plasterers, Etc.,* 240 F.Supp. 259, 263 (W.D. Mo. 1965).

This court should grant this petition and directly address this important federal labor law issue.

II.

A PUNITIVE DAMAGE AWARD WHICH FAR EXCEEDS A UNION'S NET WORTH IS CLEARLY EXCESSIVE AND UNCONSTITUTIONALLY DEPRIVES THE UNION OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW

During the trial, Local 63 elicited evidence its net worth was approximately $200,000. Although the $500,000 punitive damage award rendered by the jury was over seven (7) times the $68,187.57 compensatory damages awarded and two and one-half (2½) times Local 63's net worth, both the lower court and the ninth circuit concluded it was not excessive because Local 63's annual gross receipts exceeded 4.5 million dollars. [App. A, p. 23.]

Without citing any case authority for the proposition, the lower court concluded the union's ability to raise money was as important a factor in assessing the punitive damage award as was its net worth and suggested the award could be satisfied by Local 63 assessing each of its 16,000 innocent union members $35.00. *Id.* at 24.

Similarly, the ninth circuit, acknowledging the accuracy of Local 63's net worth and annual gross receipts, remarked Local 63's "annual income is of greater significance than the bank balance."[4] [App. B, p. 8.]

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[4]The ninth circuit did refer to three (3) punitive damage awards which, in its opinion, "were far more troublesome than that awarded in the present case." *Id. See Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 773 (9th Cir. 1984) ($200,000 punitive damage award against defendant who violated federal and state security laws and

Both this court and lower courts have repeatedly stressed the importance of a defendant's net worth in determining whether the punitive damages awarded deny due process of law guaranteed by the Fourteenth Amendment. *See e.g., Pacific Mut. Life Ins. Co. v. Haslip,* ____ U.S. ____, 111 S.Ct. 1032, 1045 (1991) (In "insur[ing] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages . . . the factfinder must be guided by more than the defendant's net worth."); *Browning-Ferris Industries v. Kelco Disposal, Inc.,* 845 F.2d 404, 410 (2d Cir. 1988), *aff'd. on other grounds,* ____ U.S. ____, 109 S.Ct. 2909 (1989) (punitive damage award upheld which represented less than .5% of the defendant's revenues, approximately .6% of its net worth and less than 5% of its net income); *Whitney v. Citibank, N.A.,* 782 F.2d 1106, 1119 (2d Cir. 1986) ("In determining the amount and effec-

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Idaho's common law of fraud and misrepresentation which constituted less than three (3%) percent of the defendant's net capital upheld); *Wyatt v. Union Mortgage Co.,* 24 Cal.3d 773, 790-91 (1979) ($200,000 punitive damage award apportioned among eight (8) corporate and individual defendants upheld as not excessive inasmuch as the defendants were guilty of fraud when they conspired to breach their fiduciary duties owed to the plaintiffs for whom they negotiated a loan which resulted in defendants "bringing in millions of dollars."); and *Wetherbee v. United Insurance Company of America,* 18 Cal.App.3d 266, 270-71 (1971) ($200,000 punitive damage award upheld against defendant with 60 million dollars in net assets and a monthly net income after taxes of 1 million dollars because it represented "less than a week's after-tax income of defendant").

None of these cases support the ninth circuit's inference a punitive damage award assessed against a losing defendant, especially a labor union, which far exceeds its net worth is not unconstitutionally excessive and does not deprive the defendant of its property without due process of law.

tiveness of exemplary damages to be awarded against the defendant, the court may take into consideration the defendant's wealth or net worth." [Case and treatise citations omitted.]); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 14 (2d Cir. 1988) *cert. den.*, 490 U.S. 1006 (1989) (court reversed one million dollar punitive damage award in part because it constituted approximately 50% of the defendants' net worth); *Arceneaux v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 767 F.2d 1498, 1503 (11th Cir. 1985) ("We realize that punitive damages should not be so out of proportion to the defendant's net worth that it destroys him."); and *Mason v. Texaco, Inc.*, 741 F.Supp. 1472, 1515-16 (D. Kan. 1990), *reversed and remanded on punitive damages issue on grounds other than income,* 948 F.2d 1546 (10th Cir. 1991) (court, citing seventh circuit's recent survey of punitive damage awards finding a typical ratio for such damages to a defendant's net worth to be approximately 1%, upheld a 25 million dollar punitive damage award which represented .31% of Texaco's net worth and 1.92% of its annual net earnings after taxes.)

Because of the amount of compensatory damages awarded; the failure of the plaintiffs to have prevailed on their battery claim; the subsequent remedial conduct Local 63 voluntarily initiated and engaged in resulting in a second nominations meeting being held two (2) months later at a different time and location with adequate security and safeguards provided to insure the violence which took place prior to the first nominations meeting would not be repeated; and the failure of the jury and courts to have relied upon Local 63's net worth, Local 63 submits the award of $500,000 in punitive damages assessed against it by the jury was clearly excessive; rendered under the influence of passion or prejudice; and

flies in the face of the prohibition against the deprivation of property without due process of law.

This court has recently declared the due process clause "places outer limits on the size of a civil damages award made pursuant to a statutory scheme," *Kelco Disposal, Inc., supra,* 109 S.Ct. at 2921, and should "not cross the line into the area of constitutional impropriety." *Haslip, supra,* 111 S.Ct. at 1046 [footnote omitted].

An award of punitive damages so inherently unfair as to constitute an unconstitutional denial of due process of law is more susceptible of occurring when the award is assessed against an unpopular defendant like the Teamsters Union in this case. "For this reason, the Court has forbidden the award of punitive damages ... in unfair representation suits brought against labor unions...." [O'Connor, dissenting] *Id.* at 1062.

"Due process requires, at some level, that punishment be commensurate with the wrongful conduct." *Id* at 1065. That has clearly not happened in this case. Because the punitive damages award assessed against Local 63 unconstitutionally deprived it of its property without due process of law, this court should grant its petition.

III.

THE NINTH CIRCUIT'S DECISION DECLARING AN AWARD OF DAMAGES SUPPORTS AN AWARD OF ATTORNEYS' FEES UNDER THE "COMMON BENEFIT" EXCEPTION TO THE AMERICAN RULE REGARDING ATTORNEYS' FEES DIRECTLY CONFLICTS WITH DECISIONS RENDERED BY OTHER CIRCUITS

Plaintiffs were only awarded compensatory and punitive damages in this case.

Although they obtained monetary redress for the personal injuries they sustained which was not shared by other Local 63 union members, the ninth circuit concluded plaintiffs were entitled to $200,000 in attorneys' fees because they met the "substantial benefit" standard enunciated by this court in *Hall, supra,* 412 U.S. at 5 (1973). [App. B, pp. 8-9.]

In concluding such, the ninth circuit stated "plaintiffs' lawsuit — and the damage award — benefits all of Local 63's members by deterring Local 63 and its officers from engaging in similar intimidation in future union elections" and by vindicating their own rights, plaintiffs " 'dispels the 'chill' cast upon the rights of others.' " *Id.* at 9, *quoting Hall, supra,* 412 U.S. at 8.

In *Hall,* this court concluded the prevailing union member conferred a substantial benefit on his fellow union members and thus was entitled to an award of his reasonable attorneys' fees pursuant to Section 102 of the LMRDA because he had succeeded in obtaining injunctive relief permanently reinstating his membership in the union.[5]

This court determined awarding attorneys' fees was justifiable because equitable considerations require that those who profit or benefit from a union member's successful litigation should share the expense incurred by the union member in bringing the suit. The easiest and most logical way to avoid the unjust enrichment of those benefitted is to make them contribute equally to the litigation expenses.[6]

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[5]Hall " 'suffered no loss of wages as a result of his expulsion from the union' and thus was not awarded any damages." *Id.* at 3 n. 3.

[6]This court previously declared in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 396-97 (1970), to award attorneys' fees in such cases

A "substantial benefit" connotes the conveyance of an immediate benefit upon third parties to the lawsuit. This court in *Hall* did not define the limits of a substantial benefit; clearly manifest what "overriding considerations" are required or how substantial the benefit need be for an award of attorneys' fees; and/or in order to be deemed substantial, whether the benefit must confer an actual, immediate benefit on the union or its members.

Since *Hall*, this court has repeatedly declared a successful litigant who has created a common fund for recovery or extended a substantial benefit to a class *and* the shifting of attorneys' fees would operate to spread the cost proportionately upon the members of the benefitted class is entitled to recover its attorneys' fees in the absence of statute or contract. *See F.D. Rich Co., Inc. v. United States, Industrial Lbr. Co., Inc.*, 417 U.S. 116, 130-31 (1974) and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975).

The ninth circuit's conclusion plaintiffs' award of damages satisfies the "common benefit" exception to the American Rule regarding attorneys' fees directly conflicts with decisions rendered by other circuits on the subject. *See Shimman v. Intern. Union of Operating Eng.*, Loc. 18, 744 F.2d 1226, 1234-36 (6th Cir. 1984) (*en banc*) (The court declared a prevailing union member who obtained a damage award was not entitled to attorneys' fees under the substantial benefit exception who contended "by in effect ending oppression of dissident members and restoring union democracy" and serving as " 'a catalyst' leading to change in the union membership," he had met the test.).

"is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them and that which would have had to pay them had they brought the suit."

The sixth circuit concluded an award of damages personal to the union member did not create a benefit held or shared in common among all union members and any incidental benefit derived therefrom did not justify an attorney fee award because to impose Shimman's attorneys' fees upon the union would not operate to spread the cost of litigation proportionately among those benefitted, a key requirement and component of the "common benefit" standard. "This is clearly not a case where the plaintiff 'benefits a group of others in the same manner as himself.' [Case citation omitted.] Shimman obtained redress for personal injuries not shared by other union members. The purpose of the common benefit exception is to shift the cost of litigation to 'the class that benefitted from them and that would have had to pay them had it brought the suit.' [Case citations omitted.] Other union members could not have brought suit to redress Shimman's personal injuries." *Id.* at 1235. *In accord, Murphy, supra*, 774 F.2d at 127 (6th Cir. 1985) and *Guidry, supra*, 882 F.2d at 944 (5th Cir. 1989) ("An award of attorneys' fees here would not spread the cost of litigation proportionate to the common benefit. Guidry would have to pay no more for the cost of litigation than any other fellow union member, but he would receive substantially greater benefits in the form of cash awards."). *Cf. Erkins v. Bryan*, 785 F.2d 1538, 1548-49 (11th Cir. 1986) ("[T]he plaintiff must prove that litigation confers significant non-monetary benefits on those persons who will ultimately pay their fees" and "those fees must spread the costs proportionately among those who benefit.").

Despite this language, the court did not follow the sixth circuit's *en banc* decision in *Shimman* because plaintiffs' lawsuit exposed significant flaws in the union's strike fund accounting procedures and demonstrated the union could not rely on the Department of Labor's investiga-

tions concerning alleged breaches of the union's fiduciary duties. The court remarked the compensatory damages awarded in *Shimman* "went solely to the named plaintiff, compensating him for assault and battery and violation of his free speech rights [and] [a]ny incentive for change in union policy was largely ancillary to plaintiff's personal recovery.".

Since the ninth circuit's conclusion plaintiffs' monetary award constituted a substantial benefit to justify Local 63 reimbursing them for their reasonable attorneys' fees directly conflicts with decisions rendered by other circuits which have interpreted and applied this court's holding in *Hall*, this court should grant Local 63's petition, decide this important question of federal labor law and harmonize the conflicting appellate opinions on the subject.

IV.

THE NINTH CIRCUIT'S DECISION ATTORNEYS' FEES MAY BE AWARDED TO A PREVAILING PARTY BECAUSE OF THE DEFENDANT'S BAD FAITH PRELITIGATION MISCONDUCT GIVING RISE TO THE UNDERLYING CLAIM CONFLICTS WITH DECISIONS RENDERED IN OTHER CIRCUITS AND RAISES AN IMPORTANT QUESTION WHICH SHOULD BE ADDRESSED AND RESOLVED BY THIS COURT

Perhaps sensing its award of attorneys' fees based upon the "substantial benefit" exception to the American Rule might not withstand judicial scrutiny, both the lower

court[7] and ninth circuit alternatively declared an award of attorneys' fees was appropriate because of Local 63's bad faith prelitigation misconduct. [App. A, pp. 31-32 and B, p. 8.]

In affirming the attorneys' award under the bad faith exception, the ninth circuit relied exclusively upon the

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[7]Although not seriously advanced by the plaintiffs on appeal nor relied upon by the ninth circuit, the lower court also concluded Local 63 engaged in bad faith during the course of the litigation:

> "Moreover, the conduct of the defendant during the lawsuit indicates bad faith. The plaintiffs' claim which rested entirely upon circumstantial evidence was rebutted by the direct testimony of the defendants which the jury must have concluded was untruthful. This too in the Court's view is clearly sufficient to satisfy the bad faith standard." [App. A, p. 32.]

It is not surprising plaintiffs retreated from this conclusion before the ninth circuit and the ninth circuit failed to adopt it in its affirming decision.

Contrary to the lower court's belief, the jury did not discredit Local 63 or disbelieve any of its witnesses as evidenced by its finding in Local 63's favor on the issue of battery.

In fact, other than whether Local 63 participated in and/or authorized the battery [which the jury concluded it did not], the lower court acknowledged most of the other ultimate factual issues were essentially not in dispute between the parties. "[T]he relevant facts upon which the jury made its determinations of liability are relatively simple and largely undisputed." *Id.* at p. 3.

From these undisputed facts, the jury concluded Local 63 violated plaintiffs' federally-guaranteed right to participate in union elections free from coercion or intimidation, caused intentional infliction of emotional distress and was negligent.

The jury did not conclude Local 63 engaged in any bad faith during the course of the litigation warranting the imposition of attorneys' fees.

jury's award of punitive damages and its conclusion the award was appropriate. [App. B, p. 8.]

In doing so, the ninth circuit cited this court's dictum in *Hall, supra*, 412 U.S. at 15 ("It is clear, however, that 'bad faith' may be found, not only in the actions that lead to the lawsuit, but also in the conduct of the litigation.").

Although this court has addressed the "bad faith" exception to the American Rule concerning attorneys' fees generally, it has never resolved the question if attorneys' fees can be awarded based upon bad faith prelitigation misconduct and, if so, under what circumstances.

If bad faith prelitigation misconduct can result in the imposition of attorneys' fees, this court has never decided if the requisite bad faith can be met by demonstrating a bad faith response to the underlying claim prior to litigation commencing which necessitated the lawsuit being brought and/or, as the ninth circuit has concluded in this case, by the conduct which gave rise to the claim itself as evidenced by a subsequent punitive damage award.

Not surprisingly, this court's failure to have specifically addressed and resolved these significant issues has resulted in conflicting and confusing decisions rendered on these points by the circuit courts.

In *Vaughan v. Atkinson*, 369 U.S. 527 (1962), this court upheld an award of attorneys' fees provided to a prevailing seaman in an admiralty case because of the shipowner's bad faith response to his underlying claim. The shipowners "were callous in their attitude, making no investigation of [the seaman's] claim and by their silence neither admitting or denying it. As a result of that recalcitrance, [the seaman] was forced to hire a lawyer and go to court to get what was plainfully owed him under

laws that were centuries old. The default was willful and persistent." *Id.* at 530-31.

Thereafter, this court has repeatedly cited as examples of bad faith only reprehensible conduct engaged in by a defendant in response to the underlying claim and not the defendant's bad faith misconduct which caused or gave rise to the claim.[8] *See e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *F.D. Rich Co., Inc., supra*, 417 U.S. at 129 n. 17 (1974); and *Alyeska Pipeline Service Co., supra*, 421 U.S. at 258-59. *But see, Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766 (1980), where this court, citing *Hall, supra*, 412 U.S. at 15, generally stated " 'bad faith may be found, not only in the actions that lead to the lawsuit, but also in the conduct of the litigation.' "[9]

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[8]Neither the lower court nor ninth circuit concluded Local 63 engaged in any bad faith misconduct after the assaults and batteries occurred.

Immediately thereafter, Local 63 granted plaintiffs' request and scheduled a new nominations meeting which was held at a different time of day and different location with adequate security and safeguards provided. Shortly after the second nominations meeting, plaintiffs commenced this litigation.

[9]This language is dictum because this court in *Hall* awarded attorneys' fees under the substantial benefit exception and not the bad faith exception to the American Rule.

Additionally, although this court cited 6 J. Moore, *Federal Practice*, ¶ 54.77[2], p. 1709, 2d ed. (1972) as support for the proposition, it failed to include the language which immediately preceded the quoted reference: "where an unfounded action or defense is brought or maintained."

In fact, recognizing a split in authority exists as to how the "bad faith" exception should be applied, Moore's recommends it be limited to bad faith demonstrated in litigation.

More recently, this court added to the confusion as to what, if any, prelitigation conduct constitutes bad faith to warrant assessing attorneys' fees in *Chambers v. Nasco, Inc.*, ____ U.S. ____, 111 S.Ct. 2123 (1991).

In *Chambers*, this court stated a defendant may be liable for a prevailing plaintiff's attorneys' fees when " 'the very temple of justice has been defiled' . . . [or] when a party 'shows bad faith by delaying . . . the litigation . . . .' ". [Footnote omitted.] *Id.* at 2133, *quoting Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) and *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978).

After determining the lower court had not sanctioned the defendant for breaching the underlying contract, this court expressed no opinion as to whether the lower court possessed the inherent power to have awarded attorneys' fees under the bad faith exception because of the defendants' conduct relating to the underlying breach of contract. *Id.* at 2138, n. 16.

In Justice Kennedy's dissenting opinion, joined in by Chief Justice Rehnquist and Justice Souter, he expressed frustration over the majority opinion's failure to have

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Moore's acknowledged the distinction which some courts (but not the ninth circuit) have made between bad faith misconduct which gave rise or caused the underlying claim and bad faith misconduct in response to the underlying claim and commented the bad faith exception should be limited to bad faith misconduct engaged in by a defendant which requires a plaintiff to hire a lawyer and go to court and obtain what was clearly owed to him since the defendant's unjustified refusal to satisfy its clear and explicit obligation continued throughout the litigation and thus the litigation was utilized by the losing defendant as a device for avoiding a clear and present duty which existed prior to the litigation commencing. *Id.* at ¶ 54.78[3], pp. 54-504-7 2d ed. (1991).

defined the "bad faith" standard concerning prelitigation conduct. *Id.* at 2141-42 and 2145.

"[C]ourts apply inherent powers without specific definitional or procedural limits. True, if a district court wishes to shift attorneys' fees as a sanction, it must make a finding of bad faith to circumvent the American Rule. But today's decision demonstrates how little guidance or limitation the undefined bad faith predicate provides." *Id.* at 2145.

Recognizing "the scope of sanctionable conduct under the bad-faith rule appears unlimited," Justice Kennedy commented the majority opinion "demonstrates, the lack of any legal requirement other than the talismanic recitation of the phrase 'bad faith' will foreclose meaningful review of sanctions based on inherent authority." *Id.*

And despite the majority opinion's express reservation of the issue, Justice Kennedy stated the bad faith exception for assessing attorneys' fees should not be predicated on prelitigation misconduct which flows from and directly resulted in the litigation. "[I]t is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation primary conduct. A Court's inherent authority extends only to remedy abuses of the judicial process. By contrast, awarding damages for a violation of a legal norm, here the binding obligation of a legal contract, is a matter of substantive law [case citations omitted] . . . which must be defined either by Congress (in cases involving federal law), or by the States in diversity cases." *Id.* at 2148.

> "The American Rule recognizes these principles. It bars a federal court from shifting fees as a matter of substantive policy, but its bad faith exception permits fee shifting as a sanction to the extent necessary

> to protect the judicial process... When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the American Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.
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> * * *
>
> To the extent that the District Court imposed sanctions by reason of the so-called bad-faith breach of contract, its decree is an award of punitive damages for the breach." *Id.* at 2148-49.

The ninth circuit in this case awarded plaintiffs their attorneys' fees because of Local 63's prelitigation conduct which resulted in the imposition of punitive damages.

This petition should be granted so this court can decide once and for all whether a party's prelitigation conduct can warrant the assessment of attorneys' fees under the bad faith exception to the American Rule and, if so, whether such bad faith conduct must be in response to the underlying claim and/or may be demonstrated by bad faith conduct causing or giving rise to the underlying claim.

This court's failure to do so will result in the continuation of inconsistent and irreconcilable decisions rendered by circuit courts on the issue. *See e.g., Huecker v. Milburn*, 538 F.2d 1241, 1245 n. 9 (6th Cir. 1976) ("Bad faith may be demonstrated by showing that a defendant's obstinacy in granting a plaintiff his clear legal rights necessitated resort to legal action with all the expense and delay entailed in litigation."); *Richardson v. Communication Wkrs. of America*, 530 F.2d 126, 133 (8th Cir. 1976) (attorneys' fees were awarded under the bad faith excep-

tion because "there is ample support for a finding of bad faith on the part of the Unions in not only failing to represent plaintiff in his grievance but in actually inducing his wrongful discharge."); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) ("There must be 'clear evidence' that the claims are 'entirely without color and made for purposes of harassment or delay or for other improper purposes.' "); *Shimman, supra*, 744 F.2d at 1233 (6th Cir. 1984) (*en banc*) ("We therefore hold that the bad faith exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim."); *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1014 (11th Cir. 1985) ("The bad faith or vexatious conduct must be part of the litigation process itself."); *Sanchez v. Rowe*, 870 F.2d 291, 293-94 (5th Cir. 1989) ("We hold that the requisite bad faith may be found in a party's conduct *in response* to a substantive claim, whether before or after an action is filed, but it may not be based on a party's conduct *forming the basis* for that substantive claim." [court's emphasis.]); *Guidry, supra*, 882 F.2d at 882 (5th Cir. 1989) ("*Shimman* makes clear that the focus of the bad faith inquiry is not the actions that precipitated the law suit, but rather the manner in which the litigation itself is carried out. That is, the rule is intended to penalize the litigant who brings to court a frivolous suit or defense, or abuses the process so as to create an inquiry separate from the underlying claim. [Case citation omitted.] This court has adopted the same reasoning." [Case citation omitted.]); *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688, 701 (D.C. Cir. 1986) ("Federal courts have applied this exception both when bad faith occurred in connection with the litigation and when it was an aspect of the conduct that gave rise to the lawsuit." [Footnotes omitted.]); and *U.S. v. Interna-*

tional Broth. of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991) (" 'We have declined to uphold awards under the bad faith exception absence both 'clear evidence' that the challenged actions 'are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes' and 'a high degree of specificity in the factual findings of the lower courts.' " [Case citations omitted.]).

V.

CONCLUSION

For ail the foregoing reasons, Local 63 respectfully submits this case presents substantial federal questions for this court's review and the decision below conflicts with other circuit authority and, as a result, this Petition for Writ of Certiorari should be granted.

Dated: February 28, 1992

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APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES BENDER, an individual, et al.,
Plaintiffs,

vs.

WHOLESALE AND RETAIL FOOD DISTRIBUTION TEAMSTERS LOCAL 63, et al.,
Defendants.

Case No. CV-86-1072 JSL
(Mcx)

Filed: July 15, 1988
Clerk, U.S. District Court
Central District of California

Entered: July 18, 1988
Clerk, U.S. District Court
Central District of California

MEMORANDUM AND ORDER ON MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, MOTION FOR ATTORNEYS' FEES AND OTHER RELIEF

This matter is currently before this court on several post-trial motions. Defendant Wholesale and Retail Food Distribution Teamsters Local 63 ("Local 63" or "Local") has brought a motion for judgment notwithstanding verdict ("JNOV") pursuant to Fed.R.Civ.P. 50(b) or, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59(a). Plaintiffs concurrently brought a motion for attorneys' fees and injunctive relief pursuant to 29 U.S.C. section 412. For the reasons stated below, the Court concludes that defendant's motions are denied, and plaintiffs' motion is granted in part and denied in part.

I. OVERVIEW

A. Procedural Background

This action involves an intra-union dispute. Plaintiffs are nine individual[1] members[2] of Local 63 who were attacked and beaten outside the Local's hiring hall as they arrived to participate in a nomination meeting for the election of union officers. Defendants are Local 63, Robert Marciel ("Marciel"), the secretary-treasurer and chief executive officer of Local 63, Joint Council 42 ("Joint Council"), a Teamster organization consisting of various locals to which Local 63 belongs, and Al Friedman ("Friedman"), an individual member of Local 63.

Plaintiffs' first amended complaint contained several claims against the defendants. Their first claim alleged a violation of the Labor-Management Reporting and Disclosure Act ("LMRDA" or "the Act"), 29 U.S.C. section 411. The plaintiffs contended that defendants violated the LMRDA by interfering with their guaranteed right to meet with other union members and participate in union elections. By this claim, plaintiffs sought compensatory and punitive damages as well as attorneys' fees, and injunctive relief against further violence. In addition to their LMRDA claim, plaintiffs asserted three pendant state claims for battery, intentional infliction of emotional distress and negligence.

This case proceeded to trial by jury on January 19, 1988. At the close of the evidence on February 19, 1988 all defendants moved for a directed verdict pursuant to

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[1]Specifically, plaintiffs are James Bender, James Brown, Hetti Cole, Dan Douglass, Jack Douglass, Eloise Harris, Harold Larsen, Harry Rodriguez, and Clyde Wallace.

[2]Plaintiff James Brown was technically not a member in good standing of the Local at the time that this dispute arose.

Fed.R.Civ.P. 50(a). These motions were denied except as to the claim for negligence which was granted as to defendants Marciel, Friedman and Joint Council.

The trial lasted for approximately 5 weeks and after 5 days of deliberation, the jury rendered a verdict in favor of Marciel and Friedman on all four causes of action; in favor of the Joint Council[3] and Local 63 for battery; and in favor of all plaintiffs against Local 63 on the LMRDA, intentional infliction of emotional distress and negligence claims. The jury awarded $68,687.57 in compensatory damages and $500,000 in punitive damages against Local 63.

B. Relevant Facts

The relevant facts upon which the jury made its determinations of liability are relatively simple and largely undisputed.

Local 63 is part of the Teamsters union and is comprised of approximately 16,000 rank and file members scattered throughout southern California from Bakersfield to Barstow. The Local's internal business affairs are managed by salaried officers that are elected to their positions every three years. Official positions include the secretary-treasurer, the highest ranked position, president, vice-president, recording secretary and several trustees. Much of the day to day business of the Local, however, is conducted by business agents who are hired by the secretary-treasurer. Defendant Marciel has held the position of secretary-treasurer since 1978 and at the time that this dispute arose in 1985, the Local employed approximately 25 business agents.

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[3]The jury was unable to reach a verdict as to Joint Council on the LMRDA and emotional distress claim.

The plaintiffs were members or supporters of an opposition slate which intended to run for election against the incumbent union management. On the evening of November 2, 1985, plaintiffs were on their way to attend a nomination meeting for officers which was to be held at the Local's hiring hall in accordance with the union's by-laws. The plaintiffs, who had met prior to the meeting, drove together to the hall in an automobile caravan. When they arrived at the hall, plaintiffs were immediately confronted by a large group of men who were blocking the entrance to the hall's parking lot. The men, all wearing blue T-shirts bearing the slogan "Teamsters Re-elect Bob Marciel and Slate, Local 63," advised plaintiffs that the lot was full and started to harass them verbally whereupon plaintiffs drove further down the street and parked some distance from the hall.

As the plaintiffs walked from their cars back to the hall, they were attacked and severely beaten by a mob consisting of 25 to 30 persons. The extent of the injuries suffered by the plaintiffs varied. The evidence showed that the women experienced severe emotional distress. The men were beaten and also suffered cuts and bruises. One of these men, who was stabbed during the attack, suffered a collapsed lung. Several of the plaintiffs required immediate medical attention after the assault. None of the plaintiffs were able to attend the nomination meeting that evening.

The plaintiffs were unable to identify any of their assailants. It appeared from the evidence, however, that all of the assailants came from among the group that had initially confronted the plaintiffs at the entrance of the hiring hall's parking lot. All of the assailants wore the "Re-elect Marciel" T-shirts. Just prior to and during the attack, the plaintiffs heard several of the unidentified

members of the attacking mob yell: "Which one is Bender"; "There's the old son of a bitch"; "Get the old Man"; "Don't let Rodriguez in here."

The incumbents were aware prior to the nomination meeting that an opposition slate was to be nominated. The incumbents were also made aware of the assault on plaintiffs almost immediately after it occurred and while the meeting was still in progress. The police arrived approximately 5 minutes after the assault occurred and went directly to the meeting to speak to those in charge. They contacted Marciel and told him that several people who had intended to run as the opposition slate in the election had just been attacked and beaten outside the hall. The officers then asked Marciel to interrupt the meeting and make an announcement calling on the crowd to refrain from further violence.

By the time the police arrived, those in charge of the meeting had closed the nominations and because there was no formal opposition declared the incumbents re-elected. Although Marciel spoke to the assembled crowd after talking to the police, Marciel did not make the announcement that the police had requested to quiet the crowd. Nor, did he at any time during the meeting acknowledge openly to those assembled that anything out of the ordinary had happened.

Several days after the meeting, on November 6, 1985, Local 63 caused a laudatory article to be published in the *Southern California Teamster*, a monthly newspaper published by defendant Joint Council, congratulating the incumbent officers on their unopposed re-election. The article made no mention of the attack on the opposition slate which prevented their nomination. In fact, the incident was never mentioned in the union newspaper, even though its broad and detailed coverage of union activities

often included articles on the most trivial matters concerning individual members.

The members of the incumbent slate had remained inside the hiring hall while the assault took place. There was some testimony that they inquired among themselves whether anyone had any knowledge about the persons responsible for the attack on the plaintiffs. But since all of the participants to these discussions were inside, even if believed, these inquiries were not calculated to produce any new information.

It was clear from the testimony that no serious investigation to find out who was responsible for this incident was ever conducted and no effort was undertaken by the incumbents to disassociate themselves from responsibility for causing it. On the contrary, all information about what happened to plaintiffs outside the union hall and who may have been responsible was left entirely to be developed by the process of rumor and word of mouth — a process which was best calculated to leave open the possibility that the attack was deliberately planned and carried out by union officials to avoid an election contest.

The plaintiffs sent a protest letter to Local 63 describing the assault. It was not until after the plaintiffs complained directly to the governing body of the International union, however, that the election was set aside and the nomination was rescheduled. The incumbent management was again unopposed at this second meeting and declared re-elected.

In the Court's view, the foregoing facts which were entirely undisputed are all that was required to pose the legal issues. The following additional facts, which the Court saw as either undisputed or established by the clear

weight of the evidence, serve to round out the overall picture placed before the jury.

The incumbents mounted an unprecedented effort to ensure that a significant number of the rank and file union members would attend the nomination meeting. Normally, campaign activity for the nomination meeting was limited to relatively minor activities such as handing out matchbook covers or calendar cards with the slate's name inscribed on them. On this occasion, however, the incumbents and their business agents published articles in the union newspaper encouraging members to attend. Buses were hired to transport members from distant areas. Beer and refreshments were made available to the members on the buses. Hundreds of blue "Re-elect Marciel" T-shirts were purchased and distributed to those coming to the meeting. Indeed, *all* of the more than $8,000 which had been raised by the incumbents to support their re-election campaign was spent in preparation for the nomination meeting. If an election had been required after this meeting, any additional funds available to finance the election campaign would have had to come from other sources.

Some of the incumbents had expected a turn-out too large to be accommodated by the hiring hall. As anticipated, there was in fact a large turn-out. More than 400 people attended the nomination meeting that evening. Yet, Local officials did not plan for or furnish any security at the meeting. When the plaintiffs first arrived at the hall, their presence was noted almost immediately. Shortly thereafter, the group of men that the plaintiffs had initially encountered at the parking lot entrance left the parking lot to confront the plaintiffs. Virtually simultaneously it was announced that the meeting was starting

and those remaining outside who had not left the lot immediately before were directed into the hall.

II. JNOV AND/OR NEW TRIAL

The strict standards associated with a motion for JNOV and/or new trial reflect the proper respect that has traditionally been accorded to jury verdicts. A JNOV is appropriate when the evidence will permit only one reasonable conclusion as to the verdict. *Peterson v. Kennedy,* 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied,* 475 U.S. 1112 (1986). In making its determination, the court may not weigh the evidence, but must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Id.* The court has broader discretion when entertaining a motion for new trial. The court may weigh the evidence and assess the credibility of witnesses and order a new trial when the verdict rendered is "contrary to the clear weight of the evidence, or to prevent, in the trial judge's sound discretion, a miscarriage of justice." *Peacock v. Board of Regents*, 597 F.2d 163, 165 (9th Cir. 1979). However, where the weight of the evidence is at issue, a new trial can only be justified when "the verdict is against the great weight of the evidence . . . or, it is quite clear that the jury has reached a seriously erroneous result." *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). The trial court may not merely substitute its judgment for that of the jury.

It should be noted at the outset that in the Court's view, the issues presented in this case were particularly well suited for general determination by jury. In pre-trial motions, the defendants had pressed hard and often for the Court to hear this case as a bench trial rather than to have it heard by a jury. The Court carefully considered

the arguments presented by the defendants in support of their position, but concluded that even though a bench trial is generally preferable where permissible, it was not preferable in this case for several reasons. First, it was obvious to the Court that the determination of this case would rest not so much on discerning the objective facts concerning what had happened, but instead, on determining the credibility of witnesses and relevant inferences to be drawn from known facts. For this purpose, it was the Court's view that the product of six minds after a collective deliberation would be far superior to the product of only one, albeit that the one view would be that of a more experienced judge. Secondly, a jury trial afforded the defendants at least equal protective advantage. If after a jury determination of liability it appeared that the jury had been carried away by passion, or had simply failed to address the legal issues in a rational fashion, the trial court could take action to correct the result. Correction of errors made by the court itself, however, were likely to require the more costly and time consuming appellate process.

Local 63 now challenges the validity of the jury's verdict. The primary bases for its challenge are that the verdict is not supported by the evidence and that the jury instructions contained significant errors and omissions. The Court is satisfied that the jury's verdict represents a careful and well reasoned consideration of the facts in light of the prevailing law, and it is fully consistent with the Court's own view of case. The major issues raised by defendant's motions will be addressed briefly below.[4]

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[4]Because defendant's arguments relating to preemption and the appropriate burden of proof were thoroughly considered by the court in pre-trial summary judgment motions, these arguments will not be addressed in the Court's response to the current motion.

A. Inconsistent Verdicts

Local 63 contends that the jury's verdicts are irreconcilable. First, it claims that because the jury failed to find against any of the defendants on the battery claim, this Court must conclude that the evidence was legally insufficient to support a finding of liability on the LMRDA and intentional infliction claims.[5] The crux of this argument concerns the question of the requisite intent. The Local argues that because the jury specifically found that the Local did not intend to commit the acts that comprised the battery, there was insufficient evidence to find that the intent requirements for the remaining claims were satisfied. The Local reasons that if it didn't intend to commit the batteries, there was no other conduct attributable to it by which it could be said to have intentionally violated plaintiffs' rights.

Alternatively, the Local argues that in light of the finding on battery, the findings of liability and corresponding punitive damage award assessed against the Local cannot stand when measured against the weight of the evidence. Indeed, the Local goes so far as to suggest that based on the facts of this case, the jury's findings can only be explained as the result of passion and prejudice.

The Local's arguments in these regards demonstrate its continued unwillingness to face the issues actually posed by the facts in this case, or the clarity with which those facts suggest precisely the verdicts rendered by the jury. While appropriate trial strategy would have permitted the case to be presented in any number of ways, as viewed by this Court, the parties presented the issues of the case to the jury as follows:

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[5]Local 63 does not argue that there is any inconsistency with respect to the jury's finding on negligence.

1. Battery Claim

Although the evidence was largely circumstantial, it demonstrably lent itself to the inference that the union management deliberately engaged a group of thugs to go out and mug the plaintiffs in order to ensure their own re-election. The way the evidence was presented, the jury no doubt considered that liability for battery turned on the legitimacy of this inference, although technically under the instructions liability could also have been found on the basis of ratification.

In a contested election as opposed to one that is uncontested, the nomination meeting plays a relatively insignificant role in the union's overall election process. Its purpose is merely to identify those union members who will run for office at an election held on some designated future date. A prospective candidate for office need not even appear at the nomination meeting in order to be nominated. All that is necessary is that two supporters attend — one to nominate and another to second the nomination.

Nevertheless, the evidence showed that having been notified that opposition candidates were to be nominated and a subsequent election therefore required, an unprecedented organizational effort was made by the incumbent management to ensure an unusually strong showing at the November 2, 1985 nomination meeting. As noted previously, the incumbents' campaign funds were entirely exhausted in preparation for the nomination meeting. Free transportation was provided, hundreds of blue "Re-elect Marciel" T-shirts were distributed, and beer was made widely available. Over 400 rank and file members attended. The formation of such an unusually large crowd, comprised of so many rank and file members drinking beer was entirely consistent with a plan to make it easier

for assailants to pass unrecognized. Similarly, the testimony showed that the blue "Re-elect Marciel" T-shirts which were worn by virtually everyone attending made it even harder to identify specific individuals in the crowd.

The Local's conduct subsequent to the assault also lent itself to the inference that it was directly responsible for the incident. The fact that no effort was ever made by Local 63 to discover the identity of the assailants suggests at least the possibility that the defendants may have known who the assailants were. At the very least, it suggests that the defendants had no particular interest in rebutting that inference or diffusing the suspicions of anyone who became aware of the incident by word of mouth. During the trial, the Local made much of the fact that the defendants had no legal duty to conduct a formal investigation. But, this argument misses the point. Were the incumbent management not involved and were they as outraged as innocent people should have been expected to be, one would have expected an investigation to be made not because there was a legal duty to do so. Instead, it should have been undertaken so that the culprits could be apprehended and the membership assured that such an outrageous interference with members' rights had not been caused by union management and would not be tolerated if caused by others.

As argued by counsel to the jury, liability for the battery claim therefore rested on the strength of the inferences that could be drawn from the known facts as to whether defendants actually sent the assailants out to attack the plaintiffs. The principal alternative explanation for the assault offered by the defendants at trial was that Bender was attacked by people who had "it in for him" as a result of his prior union activities. Another possible explanation was that the assault was not pre-planned at

all, but that the violence occurred as a result of the intoxication of the assailants. Of course, simple mob psychology without reference to the possibility of intoxication is another possibility and all other unoffered explanations must also have been given weight by the jury.

In the Court's own ultimate view, based on the evidence which was presented and the manner in which the various witnesses testified, it seemed more probable than not that one or more members of the union management actually sent the assailants out to commit the battery. This was, however, a difficult issue and the Court itself vacillated in this conclusion. Even the Court was not able to resolve the additional difficulty presented by the evidence with respect to the battery claim in that it was impossible to identify with any degree of certainty which individual(s) may have been responsible, or which person(s) acted with the knowledge or acquiescence of which other(s).

A decision by the jury that Local 63 or any of its officers were responsible for sending the assailants out expressly to commit the battery would have carried with it all of the damages — personal injury, emotional distress, and punitive damages — requested by the plaintiffs. It was the decision of this issue which was most calculated to arouse passion and prejudice that the Court felt was most likely to require the hindsight control of the court if the verdict appeared to display the product of such passion. As evidenced by its verdict, however, the jury was unable to agree that it was more probable than not that the defendants intended to commit the battery and defendants prevailed on this issue. The fact that they were unable to cross this hurdle, which the Court viewed

as the most difficult, is the best evidence of the care and precision with which the jury considered the verdict.[6]

2. LMRDA and Intentional Infliction Claims

If it was impossible to conclude that the defendants actually sent the assailants out to commit a battery, the next issue posed by the facts of this case was whether the defendants deliberately set out to create a hostile and threatening environment so as to discourage the plaintiffs from participating in the election. If the jury were to conclude that the defendants had deliberately created such a hostile environment, and if it concluded that the battery which followed was a forseseeable even though unintended result of their wrongful conduct, then the jury would be free to award the damages from the battery as well as the other damages sought by the plaintiffs. *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir. 1968); *Simmons v. Avisco, Local 713, Textile Workers Union*, 350 F.2d 1012, 1019 (4th Cir. 1965); *Parker v. United Steel Workers, Local 1466*, 642 F.2d 104 (5th Cir. 1981); *McCraw v. United Ass'n of*

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[6]The jury's action with respect to the defendant Joint Council 42 is also instructive as to the care and precision with which it undertook its deliberations. There was no evidence in the case that any representative of Joint Council played any part in the various preparations for the nomination meeting. Thhere was in fact very little evidence that implicated Joint Council in any way. Defendant Marciel, as secretary-treasurer of Local 63, was also a member of the Joint Council. The editor of the Joint Council newspaper, the *Southern California Teamster*, was shown to have been aware of the beatings when he permitted the Local to publish the laudatory article congratulating the incumbents for their unopposed election without modification or mention of the incident. Faced with only these facts on which to base its verdict, the jury was unable to reach a verdict, presumably because of disagreement as to whether the conduct of the Joint Council after the incident rose to the level of ratification.

Journeymen & App. Plumbing, Etc., 341 F.2d 705, 710 (6th Cir. 1965).

Contrary to defendant's repeated assertions in its complaints about the jury instructions and elsewhere, a finding of liability on the LMRDA or intentional infliction claim is not dependant on a finding against the Local on battery. The LMRDA prohibits any form of interference with a union member's right to participate in intra-union affairs.[7] An intentional infliction of emotional distress claim is established when the defendant is found to have engaged in outrageous conduct with the intent to cause or with reckless disregard for the probability of causing emotional distress. *Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 394, 89 Cal.Rptr. 78 (1970). Additionally, punitive damages are appropriate for both the LMRDA and intentional infliction claims. Under the LMRDA, punitive damages may be awarded where the union has "acted with actual malice or reckless or wanton indifference to the rights of the aggrieved union member." *Cooke v. Orange Belt District Council of Painters*, 529 F.2d 815, 820 (9th Cir. 1976); *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1305 (9th Cir. 1979). An intentional infliction of emotional distress claim will support a punitive damage award upon a proper showing of "malice, fraud or oppression." *Fletcher*, 10 Cal. App. 3d at 400.

Neither the LMRDA nor the intentional infliction claim required the jury to find that the Local expressly sent the

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[7]29 U.S.C. section 411 provides: "Every member of the labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings . . ."

assailants out to commit the battery. All that was necessary for a finding of liability was that the jury determine there was a plan to frighten, intimidate and discourage plaintiffs so as to prevent them from being nominated and/or participate in the nomination meeting. *Shimman v. Frank*, 633 F.2d 468 (6th Cir. 1980); *Parker v. United Steel Workers, Local No. 1466*, 642 F.2d 104 (5th Cir. 1981); *Bise v. International Brotherhood of Elec. Workers*, 618 F.2d 1299 (9th Cir. 1979).

It is obvious from its verdict that the jury agreed with the Court's own assessment in this regard, and concluded that whatever the truth about the battery — whether it was planned, hoped for or merely a matter of no concern to the union management — when the incumbents undertook to produce an environment at the meeting that would be openly hostile to the plaintiffs, the things deliberately done by the defendants were done with the tortious intent to intimidate the plaintiffs and cause them severe emotional distress. In this circumstance, the battery which in fact occurred was entirely foreseeable, and therefore the damages resulting therefrom are fairly attributed to the defendants.[8]

Local 63 has argued repeatedly that the hostile environment was produced by those running for office with their own money, and that their acts were taken in their individual capacities rather than as officials of Local 63. While this argument might have some merit if asserted as to the battery claim, it is not persuasive as to the LMRDA claim. This argument cannot withstand analysis. The

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[8]Defendant's contention that plaintiffs suffered no continuing emotional distress is hardly worth comment. It was obvious to the Court and to the jury that the emotional distress which resulted to plaintiffs from the traumatic events of November 2 and Local 63's nonresponse thereto continued to the time of trial and beyond.

nomination meeting was an official union function called for by its by-laws, and held in the local hiring hall. The Local acting through all of its officers and employees had an obligation to conduct a fair and orderly meeting assuring the protection of all its members. *Parker v. United Steel Workers, Local No. 1466*, 642 F.2d 104 (5th Cir. 1981). It was in their capacities as union officials that the defendants decided where and when the meeting would be held, how much security would be present, and what kind of "electioneering" would be permitted at or around the nomination meeting.[9]

Moreover, the evidence was clear to the Court and appeared to be to the jury that Local 63, as such, subsequently ratified the torts committed upon the plaintiffs. Ratification does not require an affirmative act. Failure to disavow conduct, *Rakestraw v. Rodriquez*, 8 Cal. 3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972), and failure to act, *Coats v. Construction & General Laborers Union*, 15 Cal.App.3d 908, 93 Cal.Rptr. 639 (1971), may also constitue ratification.

As noted above, the fact that the beating of plaintiffs had the effect of negating a planned election contest, inescapably raised the question of whether or not incumbent Local 63 management may have been responsible in some way. Regardless of how the assault actually was

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[9]Local 63 also relies on the favorable verdicts for Marciel and Friedman to argue that such verdicts are inconsistent with a finding of liability against the Local. But, again the Local misses the point. For the Local to be liable it is not necessary that each officer and/or member also be found individually liable. Also, because this case involved an unusual set of circumstances in which the plaintiffs knew nothing of what led to the assult and the defendants all denied responsibility, the burden of proof for fastening liability upon any one individual was virtually impossible to meet.

caused, after it happened, the Local management was faced with a choice. It could either behave in a manner designed to encourage rank and file members to believe that the management was responsible for the assault and approved of it, or it could take affirmative steps to dispel any suspicions with respect to its role in causing the assault.

It seems clear, that if the Local had any sincere desire to ensure that rank and file members would believe that the Local would honor its obligation to hold fair and impartial elections, it was obliged to speak out against what happened, and to do whatever it could to demonstrate that the incumbents had not been involved or, that if any had been, they would be apprehended and punished. It was also obliged to take steps publicly to assure the membership that their rights would be protected and that no similar occurrence would take place in the future. Instead, what actually was done was so far from what would have been expected, that it is hard to imagine how the Local without openly admitting to culpability could have done more than it did to preserve the threat that any future opposition would receive the same treatment as plaintiff.[10]

Therefore, whether approached from the standpoint of direct responsiblity for producing the hostile environment in which the battery occurred or of ratification of the battery after the fact, the Court finds the jury's verdict to

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[10]In its motion, Local 63 makes much of the fact that a second nomination meeting was scheduled. What the Local fails to point out, however, is that this second meeting was only called after the plaintiffs had complained directly to the International union and without any express reference to the assaults on plaintiffs.

be entirely consistent with the evidence.[11] Furthermore, the verdict is entirely consistent with the Court's own interpretation of the difficult issues presented by this case.

B. Plaintiffs not Identified as Candidates

Local 63 next claims that there is insufficient evidence to support an LMRDA claim against any of the plaintiffs except for Bender, Rodriguez, and Douglass because specific intent as required by the LMRDA was not shown. The Local bases its argument on evidence that only Bender and Douglass were known to be prospective candidates, only Bender and Rodriguez were singled out by name during the attack, and only Bender, Rodriguez and Douglass were identified to the Local by name as having been attacked. Thus, Local 63 concludes that there could not have been specific intent to interfere with the other plaintiffs' rights since they were not known to defendants.

This conclusion is not supported by the premise. The LMRDA does not require actual knowledge of the names of the people attacked. Specific intent to interfere with the rights of any *Bender supporter,* whether previously identified or not, is sufficient. This is particularly true where, as here, the intent to interfere was directed toward the plaintiffs not as individuals, but because they were intending to support in the up-coming election. The facts showed that these "unidentified" plaintiffs could easily be identified as Bender's supporters as they approached the union hall. They were entitled to the protection afforded

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[11]The court recognizes that technically this ratification would support liability for the battery itself even if the assailants were not actually sent out by the plaintiffs, but regards the failure of the jury to pick up this nuance as a harmless result of the rather general jury instructions provided to the jury.

by the LMRDA.[12] The fact that they were not identified by name does not deprive them of this right.

C. Excessive Punitive Damages

The Local also contends that the punitive damage award is excessive when compared to the amount of compensatory damages awarded and the Local's net worth. The Court disagrees.

The Local's argument again demonstrates its unwillingness to focus on the issues actually presented by this case. There is no mathematically fixed ratio by which the proper proportion between punitive and compensatory damages must be determined. *Finney v. Lockhart,* 35 Cal.2d 161 (1950); *Moore v. American United Life Insurance Co.,* 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984). The size of the award must take into consideration many factors including the willfulness of defendant's conduct and its effect on deterrence. Accordingly, an award of compensatory damages is not even a necessary prerequisite to an award of punitive damages. *Bise v. International Brotherhood of Electrical Workers,* 618 F.2d 1299, 1306 (9th Cir. 1979).

The Court is not only mindful of the peculiar vulnerabilities of labor unions and their members, but entirely sympathetic to them. If the various batteries or the emotional distress which attended them had been the primary thrust of the plaintiffs' complaint in this case, the Court might well agree with the Local's assessment that the punitive damages were too high. But, it is obvious that

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[12]Although plaintiff Brown was found not to be a member of the union and therefore technically not entitled to LMRDA protection, he was nevertheless protected from intentional infliction of emotional distress and negligence.

as serious as the physical torts committed upon the plaintiffs may have been, these were not the major issue posed by this case. What this case primarily involved, as decided by the jury, was a blatant attempt by union officials to interfere with the right of the proposed opposition candidates to wage their campaign free from coercion or intimidation, and more significantly, to allow the events that occurred at the November 2, 1985 nomination meeting to stand undisavowed as a warning to those who might otherwise seek to exercise their rights to participate in union affairs in the future.

Local 63 is a large union local comprised of approximately 16,000 members. Its annual revenues exceed $4,500,000. Union officials of Local 63 are very well paid, and their positions are understandably considered to be very attractive plums. The temptation of those who attain office in Local 63 to attempt to retain their positions by illegitimate means is very strong.

It is imperative that there be come counterforce to balance these temptations. In recognition of its own limitations, the Court has declined plaintiffs' request that it use its equitable powers to oversee the next election and to guarantee its fairness. Thus, it is the Court's view, that the $500,000 award of punitive damages is entirely salutary and well directed toward its most legitimate end. In the worst case, if the money were raised by special assessment, divided among the Local's 16,000 members, the award would amount to approximately $35 per member.[13] Such an amount would be unlikely to hurt many but

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[13]This figure is derived from the *total* award, including punitive and compensatory damages.

would escape the notice of only a few.[14] If the enforced payment by the members of this amount will discourage the elected officials of Local 63 from further acts of interference with future union elections, the money will have been well spent from the standpoint of each and every member. If it does not, and the acts are repeated often at comparable or greater expense, perhaps the membership will get tired enough of it to vote for a change.

D. Jury Instructions

The wisdom of the Court's early decision to put this case to the jury to the maximum possible extent with general and/or pattern instructions was reaffirmed by Local 63's effort to produce more detailed and specific instructions. Defendant Local 63 submitted approximately 100 proposed jury instructions to this Court. Some demonstrably misstated the law. Others were so lengthy and overly-specific, that their use could only have increased the risk of misleading and confusing the jury.

The Court concluded that all things considered, it would be more effective to provide the jury with a fair general statement of the law. Thus, the Court made a conscious decision to use pattern instructions, whenever possible, and a general verdict form. Had the Court

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[14]The Local points to its net worth and argues that the award is likely to financially "cripple" the union. The Local's argument, however, is unpersuasive. Net worth is only one measure to consider. The union's ability to raise money must also be considered. The evidence indicated a large annual income. For example, in 1986 the Local received more than $4,700,000 in income. Additionally, the Local was able to pay $970,000 in per capita tax to the higher Teamsters organizations. Faced with this evidence it is certainly not unreasonable that the jury awarded the amount that it did.

deemed that a just decision consistent with the law would require the use of more detailed instructions, it would not have risked that a conscientious jury would not be able to follow them and would reach inconsistent or unjust verdicts as a result. In that event, the Court would have opted for a bench trial.

Local 63 also argues that it is entitled to a new trial because of specific deficiencies in the general jury instructions. First, Local 63 challenges the jury instruction given for punitive damages. It argues that the Court should have used its proposed instruction which was modified to include the stricter punitive damage standard for LMRDA cases as expressed in *Quinn v. Di Giulian,* 739 F.2d 637 (D.C. Cir. 1984). Unfortunately, Local 63 overlooks the fact that this standard does not accurately represent the law of the 9th Circuit. Accordingly, the Court chose to use the 9th Circuit pattern instruction which is consistent with this circuits punitive damage standard for LMRDA cases as expressed in *Cooke v. Orange Belt Dist. Council of Painters,* 529 F.2d 815 (9th Cir. 1976) and *Bise v. International Brotherhood of Electrical Workers,* 618 F.2d 1299 (9th Cir. 1979). Additionally, the Court concludes that the award given by the jury would have been justified under either instruction.

Next, the Local contends that it was prejudiced because the jury was not provided with a written copy of what it considers the "most critical" instruction. The proposed instruction stated the following:

> In order for any defendant to be liable under the first cause of action [LMRDA], the plaintiff must demonstrate that such defendant authorized, participated in and/or ratified the assaults.

Local 63 argues that the Court correctly read the defendant's proposed instruction to the jury, but that subsequently the Court "inadvertently" failed to provide the jury with a copy of the instruction as promised.

Local 63 is apparently confused about what occurred at the trial on February 19, 1988, the day the Court read the instructions to the jury. As is evident from the transcript of the proceedings, jury instruction no. 25 which contains essentially the same language as that in the proposed instruction was read to the jury. Record at 30. Jury instruction no. 25 in relevant part states the following:

> If you find that there was wrongful interference with the federally protected right to participate in union affairs, then you must find as to any defendant in order to find him liable under the first cause of action that he either participated in the plan, participated in the acts, or ratified that wrongful interference . . .

After reading instruction no. 25, the Court expressed its belief that the proposed instruction, now urged by Local 63 was redundant. The Court nevertheless agreed to read the instruction. While reading it, however, the Court noted that the instruction was legally inaccurate because it limited liability for the LMRDA claim to the assault. As reflected in jury instruction no. 25, liability under the LMRDA may be predicated on *any* conduct that amounts to a "wrongful interference" with rights protected by the Act. The Court stated in the record that the proposed instruction was a misstatement of the law.[15] Record at 31. The Court did not then "inadvertently" fail to provide the jury with a written copy of the proposed

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[15]The court had also informed defendant's counsel at the conference on jury instructions that LMRDA liability was not limited to the assaults as a matter of law.

instruction as the defendant claims. Instead, the Court consciously refused to place before the jury a written instruction which was not only redundant, but demonstably wrong.

Local 63 next contends that the instruction on ratification was incomplete and therefore did not adequately apprise the jury of the applicable law. The Court does not agree. Contrary to the Local's assertions, the ratification instruction that was given is an accurate reflection of the law, *Rakestraw v. Rodriguez,* 8 Cal.3d 67 (1972). There is no requirement that ratification necessitates an affirmative *act* as the Local suggests. More significantly, however, the Local's suggestions for refining the ratification instruction are largely either incorrect or irrelevant. For example, there was no evidence that the officers of the Local instructed its members not to engage in violence at the meeting[16] or that it ever disavowed any benefit from the acts which helped to cause the ongoing intimidation gained from the unlawful conduct in question. Thus, the presence or absence of such instructions could not have affected the jury's determination in this case.

Lastly, Local 63 contends that the Court erred because it failed to instruct the jury on contributory negligence. The Local argues that "if the plaintiffs expected and anticipated harassment . . . they were arguably contributorily negligent." The Court finds this contention shocking. There was no evidence to indicate that the plaintiffs did anything other than attempt to exercise their right as protected by law to participate in the union's political affairs. The peaceful exercise of rights created and pro-

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[16]Indeed, the evidence was that Marciel declined to do so after having been asked by the police.

tected by federal statute is not negligent even when there may be reason to believe that those rights will be violated.

III. MOTION FOR ATTORNEYS' FEES AND OTHER RELIEF

The LMRDA provides the courts with broad equitable powers to grant "such relief (including injunctions) as may be appropriate." 29 U.S.C. section 41. Plaintiffs now ask this Court to exercise its discretionary power to provide both injunctive relief and attorneys' fees. For the reasons stated below, the Court concludes that plaintiffs' request for injunctive relief must be denied, while the request for attorneys' fees is granted as modified.

A. Injunctive Relief

Specifically, plaintiffs seek the following injunctive relief. First, they request that the Court supervise the next nomination meeting of the defendant Local 63 so as to ensure that there is no repetition of the acts complained of in this case. Second, plaintiffs ask the Court to require Local 63 to mail to its members a copy of the Los Angeles Times article published on February 26, 1988, which describes among other things the jury's verdict in this action.

Local 63 urges primarily that plaintiffs have waived their right to these remedies by failing to have them included in the pretrial conference order. It is not clear to the Court that matters of remedy, as opposed to fact or legal conclusion, can be waived in a pretrial conference order in an LMRDA case where the Act confers such broad power on the court to fashion appropriate relief. In any event, it is clear that the Court itself would not be bound by such a waiver if it felt that interests of justice required that particular relief be granted.

The request for court supervision of the nomination meeting, however, is clearly inappropriate. Although the court has broad authority to fashion relief under the LMRDA, the court may not directly interfere with the electoral process by supervising union elections. *Local No. 82, Furniture & Piano Moving, etc. v. Crowley*, 467 U.S. 526, 546 (1984). Because the nomination meeting is an integral part of the union's overall electoral process, this Court must decline any request for relief which would require it to take on a supervisory role with respect to any such meeting. Furthermore, the Court has concluded that the punitive damage award granted to the plaintiffs by the jury in this case was specifically intended to serve as a deterrent to future unlawful interference in union elections by the union or union management. The Court believes that the verdict is well-directed to this end. For this reason alone, the Court would decline to interfere in future elections before it has been made clear that the jury's action has failed in its purpose.

Plaintiffs' request for an order requiring the Local to mail copies of the Los Angeles Times article to its members must also be denied. *Crowley* of course does not prohibit such relief merely because it might indirectly bear upon a union election.[17] The Court acknowledges that plaintiffs have a legitimate interest in having the membership notified of the outcome of this case so that the chilling effect on free elections of what happened to the plaintiffs and the response of the union management to those events will be offset to the maximum extent possi-

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[17]In *Crowley*, the Court held that direct supervision of union elections was not an appropriate remedy for a Title I suit. The Court cautioned, however, that this did not mean that a court might not grant relief that indirectly relates to the election process when it is necessary to effectuate the purposes of the LMRDA. *Crowley* at 548.

ble. The article in question, however, is not wholly accurate, and is not an appropriate vehicle for accomplishing plaintiffs' purpose. For this reason, the Court chooses to assume that the jury's decision standing alone will be sufficient to its purpose, and will not act to supplement it at this time.

B. Attorneys' Fees

Attorneys' fees may be awarded in the interests of justice to the prevailing party in a suit involving an LMRDA claim. *Hall v. Cole*, 412 U.S. 1 (1973). Such awards are appropriate when the determination of the claim confers a substantial benefit to all members of the union or when the defendants conduct constitutes bad faith. *Id.* at 4; *Bise International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1306 (9th Cir. 1979). Bad faith may be found in the conduct that gives rise to the substantive claim as well as in the conduct of the litigation. *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir. 1982). Plaintiffs are entitled to attorneys' fees under either standard.

The facts necessarily found by the jury in this case support the bad faith rationale for awarding attorneys' fees both in the conduct which gave rise to the claim and in the conduct of the lawsuit. The defendant was found by the jury to have intentionally interfered with the free conduct of a union election by creating an environment at the nomination meeting which was openly hostile to the expected opposition slate. Standing alone, this conduct was sufficient to satisfy the bad faith requirement. Coupled with the manner in which Local 63 management behaved after the assault — a manner calculated to reinforce suspicions that it might have been responsible for the actual batteries committed upon the plaintiffs —

there can be no doubt that the plaintiffs claim rested upon the bad faith of the defendants in the conduct of their duties.

Moreover, the conduct of the defendant during the lawsuit indicates bad faith. The plaintiffs' claim which rested entirely on circumstantial evidence was rebutted by the direct testimony of the defendants which the jury must have concluded was untruthful. This too in the Court's view is clearly sufficient to satisfy the bad faith standard.

There is also no doubt that the decision in this case conferred a substantial benefit to the union. The vindication of personal rights guaranteed under the LMRDA in many circumstances "necessarily [renders] a substantial service to the union as an institution and to all of its members."[18] *Hall v. Cole,* 412 U.S. 1, 8 (1973). More importantly, the jury's verdict in this case did far more than simply vindicate the rights asserted by the plaintiffs. The jury's liability verdict established that the incumbent management had unlawfully interfered with the conduct of a free union election, and its punitive damage award was specifically directed to providing a strong deterrent to any repetition of that conduct. That is a benefit to the union itself, in which all of the union members share

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[18]The Local's contention that a substantial benefit is conferred only where plaintiff concurrently receives injunctive relief is unpersuasive. Each case necessarily involves unique facts and circumstances as to which particular forms of relief may or may not be appropriate. Whether a substantial benefit has been conferred as a result of a particular case therefore cannot be made to depend on the particular relief chosen by the court to effectuate the verdict. Accordingly, the Court declines to follow the 6th Circuit approach adopted in *Shinman v. Intern. Union of Operating Eng., Local 18,* 744 F.2d 1226 (9th Cir. 1984).

equally, and which goes far beyond the scope of the relatively nominal compensatory relief awarded to the plaintiffs for the violations of their individual rights.

By their motion, plaintiffs request $254,095 in attorneys' fees. Local 63 argues that this amount is excessive. The Court agrees, but only in minor part.

When evaluated in light of the factors enunciated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976),[19] it is evident that the attorneys' fees requested by plaintiffs' counsel are not significantly out of line.[20] The fee request is based upon the hours actually charged to the case at ordinary billing rates. The case was peculiarly difficult from the plaintiffs' standpoint because it required that the burden of proof be met by circumstantial evidence sufficient to persuade the jury that direct testimony denying the

[19]The relevant factors to consider are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

[20]The Court rejects Local 63's contention that the plaintiffs are not permitted to recover attorney's fees for time spent in preparing the pendant state claims or in litigating this case against any defendants other than the Local. First, Local 63 has not cited relevant authority involving an LMRDA claim to support this proposition. Secondly, although the Local's argument may have merit under certain circumstances, it is not relevant to the present case. Here, because of the factual and legal interrelatedness of the claims, most of the work essentially overlaps.

responsibility of the defendants was untrue. This required the plaintiffs to devote extraordinary time and effort to amassing as much circumstantial evidence as possible and to analyze and develop the entire body of information so amassed in extreme detail so as to present it as persuasively as possible in court.

This case had an extraordinarily preclusive effect on the ability of the plaintiffs' counsel to maintain the balance of their practice. Because the case depended so much on the credibility of various witnesses, depositions for both sides tended to be long and exhaustive. Additionally, summary judgment motions were brought *seriatim* by the defendants Joint Counsel and Local 63 on separate hearing dates. Although arguably the later motion by Local 63 did raise some new matters which had not been raised earlier by the Joint Council, most of the material was entirely redundant and the effort expended by plaintiffs' counsel to respond was largely duplicative.

In connection with the trial and the pretrial motions, plaintiffs' counsel spent a total of 19 days in court, excluding the five days of deliberations. At trial, defense counsel spent substantial amounts of time cross-examining witnesses for the plaintiffs concerning events surrounding the various batteries. These events were not really in dispute and there was little reason to believe that the testimony at trial would differ in any material way from that which had been elicited earlier at deposition. In an effort to expedite the trial, the Court noted its own view of the lack of efficacy of these questions several times during the course of the trial.

By these comments, the Court does not necessarily intend to suggest that any or all the foregoing was done specifically with the intent to increase the burden on

plaintiffs' counsel, but there can be no serious doubt that it had that effect.

Both of the plaintiffs' counsel are lawyers of outstanding skill, experience and reputation. The firm of Ball, Hunt, Hart, Brown & Baerwitz with which Mr. Finkle was a partner at the time that he took this case is well and favorably known to the Court, but not as a firm which ordinarily holds itself out as available to take cases of this kind. The result in this difficult case demonstrates the value of having such firms with attorneys of Mr. Finkle's ability be willing to take such cases.

For the foregoing reasons, the Court does not view the "comparable awards" tendered by defendants in opposition to the fee request as being comparable.

Of the *Kerr* factors applicable to this case all have been discussed above except whether the fee was fixed or contingent. In this case, the fee was contingent. The total amount of the damages awarded to the plaintiffs in this case was $568,687.57. Since the case was tried to conclusion, it is appropriate to compare the requested fee with 40% of the amount recovered by the plaintiffs. This test would provide a fee of $227,475, an amount consistent with the fee request. Arguably of course since the fee is to be awarded on top of the recovery to the plaintiff, the proper amount against which to test the 40% is against the total amount of the award including the fees. The fee computed on this basis would be $329,113. This amount, however, would be even higher than the amount requested by counsel, and would not be acceptable to the Court.

It could also be argued that since counsel has a fee agreement out of which it will be paid in all events, and since the non-compensatory damages awarded to the plaintiffs are sufficient to pay the fee, attorneys' fees

should not be awarded at all. Plaintiffs have neither argued nor offered any authority for such a proposition. The Court has rejected it because it appears that the ratio between the punitive damage award and the relatively low compensatory damage award for the obviously significant emotional distress suffered by the plaintiffs is weighted heavily in favor of the punitive damages. This may well reflect the jury's desire to avoid double compensation for the plaintiffs, while making sure that the "message" intended by their verdict is not misunderstood.

Taking all of these considerations together, the Court has concluded that an award of $200,000 for attorneys' fees is appropriate in this case. As indicated by the analysis previously undertaken when examining the effect of the punitive damage award spread among the entire body of the members of Local 63,[21] if the total payment for which the union will be responsible is raised from the $568,887 assessed there to $768,687 so as to include attorneys' fees, the assessed amount will be less than $50 per member. If this amount assured free elections through the course of future years as intended by the jurors, it would be a cheap price to pay.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

(1) Local 63's motion for judgment notwithstanding verdict pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59(a) is denied;

(2) Plaintiffs' motion for injunctive relief pursuant to 29 U.S.C. section 412 is denied; and

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[21] *See supra* text accompanying note 13.

(3) Plaintiffs' motion for attorneys' fees pursuant to 29 U.S.C. section 412 is granted in the amount of $200,000.

DATED: July 15, 1988

J. SPENCER LETTS
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES BENDER, HARRY RODRIGUEZ, CLYDE WALLACE, DAN DOUGLAS, JACK DOUGLAS, HAROLD LARSON, HETTIE COLE, E. ELOISE HARRIS, JIM BROWN,
Plaintiffs-Appellees,

v.

WHOLESALE AND RETAIL FOOD DISTRIBUTION, TEAMSTERS LOCAL 63,
Defendant-Appellant

and

JOINT COUNCIL OF TEAMSTERS NO. 42, ROBERT MARCIEL, AL FRIEDMAN,
Defendants.

No. 88-6320

D.C. No. CV-86-1072-JSL

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted July 9, 1991
Pasadena, California

Before: Stephen Reinhardt and Ferdinand F. Fernandez, Circuit Judges, and Fern M. Smith**, U.S. District Judge

Filed: December 23, 1991 Cathy A. Catterson, Clerk
U.S. Court of Appeals

The plaintiffs were attacked when they attempted to attend a meeting of the Wholesale & Retail Food Distribution Teamsters Local 63 (hereinafter "Local 63"). Local 63 appeals a civil jury verdict that it was liable for this assault and the district court's award of attorney's fees to the plaintiffs. We affirm the jury verdict and the fee award.

Local 63 first argues that it could not be found liable to any of the plaintiffs under the Labor Management Reporting and Disclosure Act ("LMRDA"). Section 411(a)(1) of the LMRDA, 29 U.S.C. § 411(a)(1), provides that:

> "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

These rights can be enforced through 29 U.S.C. § 412, which permits an aggrieved individual to "bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." The provisions of the LMRDA encompass Local 63's actions. There was more than sufficient evidence at trial to support a conclusion that Local 63 organized the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Hon. Fern M. Smith, U.S. District Judge for the Northern District of California, sitting by designation.

nomination meeting in a manner which would intimidate the plaintiffs and interfere with their right to participate in the nomination process. The attack on the plaintiffs thus is actionable under the LMRDA. *See Murphy v. International Union of Operating Engineers*, 774 F.2d 114, 126 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) ("[T]he district court found sufficient evidence that Murphy's attackers were acting on behalf of the union leadership and were attempting to suppress Murphy's participation in union activities. This evidence of intimidation and physical violence fully supported [the district court's] finding that Murphy's section 411 rights had been violated.").

Local 63 next contends that James Brown could not recover under the LMRDA because he was not a union member on the day of the assault. The district court found that Brown was not a union member on that day and apparently granted summary judgment against him on his LMRDA claim: plaintiffs do not contest this finding on appeal. The district court instructed the jury that only individuals who were union members on the day of the assault could recover under LMRDA; neither party claims that this instruction was improper.[1] The jury's general verdict did not specify whether the award for Brown against Local 63 was based upon the LMRDA, negligence, or intentional infliction of emotional distress: the verdict form that the jury was given did not permit it

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[1]Because Brown had a colorable claim to valid union membership on the day of the assault, and because the district court granted summary judgment against him on his federal claim only a week prior to trial, the district court properly retained Brown's state-law claims as an exercise of its pendent jurisdiction. *See Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903-04 (9th Cir. 1983).

to make such a specification. This imperfection, however, does not entitle Local 63 to a reversal of Brown's award. The jury was instructed that an award under the LMRDA could only be given to individuals who were union members on the day of the assault: "it is our responsibility to presume that a jury follows clear instructions." *United States v. Gomez-Norena*, 908 F.2d 497, 501 n.3 (9th Cir.), *cert. denied*, 111 S.Ct. 363 (1990).

In any case, "we may construe a general verdict as attributable to one of several theories if it was supported by substantial evidence and was submitted to the jury free from error." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 779 (9th Cir. 1990) (citing *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) and listing factors to be used when exercising this discretion). Not only was the evidence against Local 63 sufficient to support an award for Brown on his state-law claims, but these causes of action are also subsets of liability under the LMRDA. It is inconceivable that the jury based its award to Brown on the LMRDA claim alone: its general verdict thus does not entitle Local 63 to a reversal of Brown's award.

Local 63 also contends that it was not liable to several of the plaintiffs under the LMRDA because they suffered only emotional damages. We previously have held that "emotional distress, standing alone, is an insufficient basis for the award of damages under the LMRDA." *Higgins v. Harden*, 644 F.2d 1348, 1353 (9th Cir. 1981). However, each of the plaintiffs was physically assaulted and suffered more than merely emotional distress. In addition, even if an award to these plaintiffs was impermissible under the LMRDA, as noted above, there was sufficient evidence to support recovery on the two state-law causes of action and hence to validate the jury's general verdict for these plaintiffs.

Local 63 next argues that it cannot be held liable to any of the plaintiffs because it did not "authorize, participate, or ratify" its members' assault. Because common law agency principles apply to the present suit, Local 63 is liable for the acts of its agents within the general scope of their authority or through ratification by approval of their conduct with knowledge of the possibility of illegality. *See Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980).[2] Despite the fact that the jury did not find Mr. Marciel personally liable for the assault on the plaintiffs, there was ample evidence to support a conclusion that officers of the union organized the nomination meeting in a way which a reasonable person would recognize might intimidate the plaintiffs, cause them harm, and prevent them from exercising their rights under the LMRDA. Similarly, substantial evidence supported a conclusion that union officials benefited from the assault on the plaintiffs and engaged in actions which ratified this assault. In such a situation, the jury need not find Mr. Marciel (or any other particular union official) liable in order to Local 63 liable for the harms suffered by the plaintiffs. *See Coats v. Construction & General Laborers Local No. 185*, 15 Cal.App.3d 908 (1971).

Local 63 next claims that it could not be found liable to the plaintiffs for negligence both because it had no duty to protect them from the assault by its members which

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[2]Local 63 also claims that it is entitled to reversal because the instructions given to the jury on the agency issue contained a number of errors. Each of these claims is without merit. The court properly instructed the jury that it must find authorization, participation, or ratification before it could hold Local 63 liable for the acts of its agents, and these instructions were delivered both orally and in written form to the jurors. The failure to give certain particular instructions requested by Local 63 — several of which misstated the appropriate law — in no way prejudiced Local 63's defense.

occurred on the sidewalk outside the union hall and because Local 63's actions were not a proximate cause of the assault. However, substantial evidence supported the conclusion that Local 63 could have foreseen that the plaintiffs might be assaulted if they attempted to attend the nominations meeting given the unique circumstances — many of which were created by Local 63 officials — which surrounded this meeting. "[W]hile a criminal act of a third person is generally a superseding cause of injury, such is not the case where intentional or negligent conduct creates a foreseeable and unreasonable risk of harm from conduct of a third person and liability for that harm can be imposed on the original actor even though the third party's conduct be criminal." *7735 Hollywood Blvd. Venture v. Superior Court*, 116 Cal.App.3d 901, 904 (1981). Local 63 also contends that the court erred because it did not instruct the jury that contributory negligence could bar plaintiff's recovery. The district court properly found this contention "shocking. There was no evidence to indicate that the plaintiffs did anything other than attempt to exercise their right as protected by law to participate in the union's political affairs. The peaceful exercise of rights created and protected by federal statute is not negligent even when there may be reason to believe that those rights will be violated."

Local 63 next contends that it cannot be held liable for intentional infliction of emotional distress because the jury did not find it liable for battery. The two findings, however, are not inconsistent. The jury may have believed that Local 63 intentionally engaged in a course of action designed to humiliate the plaintiffs and deter them from entering the nominations meeting but did not intend to do other acts which were the proximate cause of the battery of the plaintiffs. Although the trial court instructed the jury that "[t]the intent necessary to constitute battery is

not an intent to cause harm, but an intent to do the act which causes harm," we decline to read this instruction so broadly as to insulate Local 63 from liability simply because the jury failed to find liability for battery in addition to intentional infliction of emotional distress.

Local 63 next appeals the jury's award of punitive damages. Local 63 first claims that no evidence exists which supports a finding of its reckless indifference or malice towards the plaintiffs. However, there was substantial evidence that Local 63's actions were motivated by a dislike of the plaintiffs and that, at the very least, Local 63's organization of the nominations meeting was recklessly indifferent to the dangerous situation created by its actions. The jurors' finding was amply supported by the evidence: we will not substitute our judgment for theirs. *See Bise v. International Brotherhood of Electrical Works*, 618 F.2d 1299, 1306 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980).[3]

Next, Local 63 contends that the jury's punitive damage award of $500,000 was grossly excessive and should be reversed. We disagree. Local 63's conduct was sufficiently reprehensible to justify the jury's award. The trial court's approval of this award is entitled to significant weight. *See Roemer v. Retail Credit Company*, 44

[3]Local 63 also asserts that the jury was improperly instructed on the issue of punitive damages because it was instructed that such damages could be awarded if Local 63's actions were "maliciously, or wantonly, or oppressively done" instead of done "with actual malice or reckless or wanton indifference." Local 63's contention borders on the frivolous. Local 63 also argues that the punitive damage instruction failed to indicate that punitive damages could not be awarded for mere negligence. However, the language of the punitive damage instruction clearly precluded such an award. Local 63 suffered no prejudice whatsoever from the punitive damage instruction given.

Cal.App.3d 926, 937 (1975). The punitive damages award is approximately seven times the compensatory damages award of $68,687.57. Trial testimony indicated that Local 63's net worth was around $200,000.00, but that it collected approximately $4.7 million in income each year. In this case, the annual income is of greater significance than the bank balance. Other cases have upheld punitive damage awards which were far more troublesome than that awarded in the present case. *See, e.g., Hatrock v. Edward D. Jones Co.*, 750 F.2d 767 (9th Cir. 1984); *Wyatt v. Union Mortgage Company*, 24 Cal.3d 773, 157 Cal.Rptr. 392 (1979); *Wetherbee v. United Insurance Company of America*, 18 Cal.App.3d 266, 95 Cal.Rptr. 678 (1981); The jury's punitive damages award of $500,000 was not excessive.

Local 63's next to last argument is that the district court's award of attorney's fees was improper. "Attorney's fees [in LMRDA actions] are allowable when: (1) the opposing party acted in bad faith; [or] (2) the litigation performed a valuable service for the union and its members." *Bise*, 618 F.2d at 1306. The district court correctly found both grounds to be present here. Local 63's "bad faith" was amply demonstrated by the jury's award of punitive damages, and the appropriateness of that award, *see supra* at 7-8, similarly justifies the district court's award of attorney's fees. *See Hall v. Cole*, 412 U.S. 1, 15 (1973) ("'[B]ad faith' may be found . . . in the actions that led to the lawsuit."). The fee award was also proper under the common benefit doctrine. An injunction or other equitable relief is not a prerequisite to a fee award: all that is required is that "the plaintiff's successful litigation confer[] 'a substantial benefit on the members of an ascertainable class.'" *Hall*, 412 U.S. at 5 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970)). The plaintiffs' lawsuit — and the damage

award — benefits all of Local 63's members by deterring Local 63 and its officers from engaging in similar intimidation in future union elections. *See also Kinney v. International Brotherhood of Electrical Workers*, 939 F.2d 690, 692 (9th Cir. 1991) (awarding attorney's fees and noting that a "successful suit will deter the union from similar unlawful conduct in the future, even absent an award of damages, because the union now knows the action was illegal"). In addition, "by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others." *Hall* 412 U.S. at 8. The district court thus properly awarded attorney's fees to the plaintiffs.

Lastly, Local 63 challenges the amount of attorney's fees awarded by the district court. The claims in the present case overlapped significantly, and the district court carefully reviewed the fee request submitted by the plaintiffs. The district court's award did not constitute an abuse of discretion. *See Bise*, 618 F.2d at 1306.

The decision of the district court is AFFIRMED.

APPENDIX C

COURT'S INSTRUCTION NO. 67

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages, and you further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was maliciously, or wantonly, or oppressively done, then you may add to the award of actual damages such amount as you shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a

matter exclusively within the province of the jury, if you unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff was maliciously or wantonly or oppressively done; but you should always bear in mind that such extraordinary damages may be allowed only if you should first unanimously award the plaintiff a verdict for actual or compensatory damages. And you should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.